No. 14540

United States Court of Appeals

For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF
of
BOEING AIRPLANE COMPANY
Petitioner

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I.
The Record Does Not Support the Statements in the Board's Brief as to the Nature and Character of the Activity that Occasioned Pearson's Discharge.

The Board's brief would have the Court view the program of activity that occasioned Pearson's discharge merely as an innocuous after-the-fact gesture of assistance on the part of the Union to its members, in the direction of finding jobs for them elsewhere after the Union's collective bargaining efforts to obtain a "satisfactory" increase for them had been in vain. The statement is made (Board br. 9):

> "When the Company refused to meet the Union's wage demands, the Union in effect said to the employees, 'Our efforts to get you a satisfactory wage having failed, we will put those who wish to change jobs in touch with other employers.' *This in essence was the MAC.*" (emphasis added)

What in effect actually was said to the employees may be more aptly put as follows:

> "The executive group of the Union has devised an extraordinary new weapon to be used against the Company. This device affords a means of inflicting damage on the Company far more severe and lasting than any damage that could be hoped to result from a strike but while our plan has all of the advantages of a strike, and more, it has none of the disadvantages. Our plan is the Manpower Availability Conference and there is no valid reason why you should not support it and carry it out. Under the plan, your jobs will be absolutely secure as long as you want them, and the Company can do nothing but continue to pay you your full salary irrespective of the number of permanent terminations that may be encouraged and brought about by it, or of the number of potential new hires that may be turned away as a result, or of the ultimate damage that such program may cause. You simply cannot lose and the Company thus will be required to finance the very campaign that is aimed at paralyzing its operations, or forcing its capitulation."

As pointed out in the opening brief, the program was devised by Union executives many months prior to the time that anything approaching a bargaining impasse occurred. It was developed as one of several alternative considered "plans of action" and such alternatives afford a key to the prime objective of the plan finally adopted. As mentioned in the opening brief the alternatives included mass refusals to punch time clocks; mass refusals to work overtime; "arrangement" of simultaneous medical or dental appointments to bring

about sporadic mass absences; intermittent work stoppages; union meetings during working hours; action calculated to "neutralize" the Company's recruitment campaign in various colleges and universities by discouraging potential new hires from coming to Boeing for employment, etc. (R. 100, 240, 245-6, 334-9, 345-6, 370).

Early assertions as to the primary objectives of the MAC, prior to this litigation and the immediately preceding period, merit particular attention. In the description of the plan prepared by the Union committee that conceived it, an objective of the plan was candidly represented to be "to encourage engineers to seek more suitable employment elsewhere" (R. 368). The MAC was described to employees as a "punitive action *to reduce the engineering services available to Boeing*" (R. 33, 478) (emphasis added). It was represented to employees that the publicity attendant upon the MAC would have a "punitive" action to *discourage new hires from coming to Boeing* (R.32-3, 477-8) (emphasis added). It is to be noted also that, throughout, the Union was well aware of the fact that engineers were in critically short supply (R. 360) and of the potential damage to the Company inherent in activating the plan (R. 419-20). Compare the Board's characterization of the plan (Board br. 9) with the following testimony of the Union's chief executive at the time:

> "Question. These actions, including the Manpower Availability Conference, and the refusal to punch time clocks, and these other plans of action

which were set forth in the plan of the Action Committee, were all designed to bring pressure on the company without the necessity for a full strike, isn't that correct?

Answer. Without the necessity for a full strike, you say?

Question. Rather than going out on strike, everybody leaving their jobs?

Answer. I would say these have been considered as an alternative or as an adjunct to the strike." (R. 343-4)

The contention that important objectives of the plan were "to obtain data concerning the 'market value' of engineers" (R. 32, 477) and "to provide a meeting place where prospective employers could be contacted on an exploratory basis" (R. 32, 477) can hardly be regarded seriously. It is part of any Union's obligation as collective bargaining agent to have at all times general knowledge of "going rates" or market value. To obtain such knowledge what more would have been necessary than to direct written or telephoned inquiries on the point to various agencies, firms or employees throughout the country? And at the present time, when collective bargaining negotiations are the rule rather than the exception, "going rates" are matters of common knowledge to employers and unions alike. These and similar stated objectives of the MAC plan were clearly makeweight.

Again, concerning the nature and character of the activities under consideration, the Board's brief repeatedly speaks of "the employees" and attempts to

convey the impression that we are here dealing with a spontaneous concerted movement of the group of employees in the SPEEA unit, acting as a body. Such a characterization was not the case in any sense of the word and is irreconcilable with the concession made on page 18 of the Board's brief that actually only 2.7% of the employees expressed the desire to obtain other employment. Under the Act (Section 9(a)) a certified bargaining agent is authorized as the exclusive representative of all the employees in the appropriate unit *for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.* The statutory scope of such agent's authority to act on behalf of all employees without their specific and individual authorizations is limited to the matters italicized above. It has no statutory authority whatever to induce or encourage employees within the unit to leave their employment and go elsewhere. It has no statutory authority to facilitate such movements or find jobs elsewhere for such employees or put them "in touch" with other employers. To the extent that the MAC plan involved activities of this nature, the individuals engaged therein were not acting on behalf of the group of 3,500 engineers in the unit, and the activities must be viewed as those of individuals rather than those of a certified collective bargaining agent. Thus, in the MAC plan of action we are dealing actually with a small minority group of employees who were attempting to promote, encourage and induce mass terminations among the entire collective bargaining unit. The Court

is not here presented with the situation where a group of employees, spontaneously and on their own, approach the employer with their ultimatum to quit and go elsewhere unless their terms are met, as in *N.L.R.B. v. Southern Pine Electric Coop.*,* cited in the Board's brief on page 16.

II.

The So-called "Gentlemen's Agreement" Relating to Members of the Aircraft Industries Association Has No Bearing on the Issue Before the Court.

In several places (Board br. 3, 11, 17, 18 and 19) the Board's brief attempts to place great emphasis on the so-called Gentlemen's Agreement as justifying the MAC activity and rendering it subject to the protection of Section 7 of the Act. The majority opinion of the Board contains no finding that will support such a contention.

The term "Gentlemen's Agreement" was used in the proceedings in reference to a policy described in a resolution of the Aircraft Industries Association, an association of some eighty firms engaged in the manufacture of aircraft and accessories, of which association the Company is a member (R. 439). It was a policy advocated and in effect compelled by the Air Force (R. 436-8, Res. Ex. 23). The complaint makes no mention of the Gentlemen's Agreement or any contended relation of the MAC thereto (R. 6-14). Evidence was offered by the General Counsel, and admitted over objection, the substance of which was that such policy

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* Complete titles and reporter citations of cases mentioned herein are shown in the table of cases following the index hereto.

condemned the practice of offering employment to employees working for other members without the consent of the latter, and recommended that "pirating" of employees be discouraged (R. 450-1). The Union could not have "misconceived the effect" of it, as suggested in the Board's brief, as the Company advised the Union in writing and in detail as to the Boeing practice in connection with such policy several months prior to activation of the MAC (R. 503, G.C. Ex. 10). While the Board majority (R. 132) stated that they "reject the [Company's] further contention that the impact of that agreement was not properly in issue in this proceeding" on the other hand, they later state (R. 135): "Whether the Gentlemen's Agreement in fact restricted the employment opportunities of the [Company's] engineers *is in our opinion immaterial to the issues of this case.*" (emphasis added)

For this reason, no reference to the matter was made in the opening brief, but in view of the remarks in the Board's brief on the subject, a brief discussion of it follows.

In regard to such policy, it appears to be the nature of the Union's contention that secret dealings, for new employment, between Union members employed by Boeing, on the one hand, and other employers, on the other, are hampered by the policy with the result that efforts to obtain employment elsewhere (without jeopardizing existing employment) are impaired to the detriment of Union members. Neither such contention nor the contentions made in the Board's brief are of any substance, for the following reasons:

(a) The "policy" involves no contractual obligation or understanding, either oral or written (R. 438).

(b) Whatever the practices of other employers, the Record is absolutely clear that Boeing has never at any time refused permission to an employee to go to another employer (R. 442). The members of the AIA are not members of a multiple-employer unit (R. 448). No such unit is involved in this case, and the actions and policies important to the issue in this case can be only those of Boeing and not of some other firm.

(c) It has been the Company's long established practice antedating the AIA resolution, to attempt to afford to the Company an opportunity to interview an employee when an inquiry as to his employment comes from another employer. Where the Company is unsuccessful in persuading such an employee to remain in the Company's employ, no termination occurs and secret negotiations with such other employer are completely available to him. This is the extent of the Company's practice and policy as to its employees, in connection with the so-called 'Gentlemen's Agreement" (R. 442-3).

(d) As indicated above, the Company's practice in connection with the policy mentioned in the AIA resolution imposes no "restriction" of employment. Any contention that the "policy" imposes a restriction, in the sense that it renders it difficult for employees to contact other employers without knowledge of such contacts coming to the attention of their immediate employer, is without merit. The Record clearly shows that Boeing employees are not prejudiced by any such

contended lack of secrecy, as they may continue to work or subsequently carry on secret negotiations if they choose. Further, in the majority of cases, such knowledge would continue to come to the immediate employer in any event as a result of the normal inquiries of other firms concerning the work record, with previous employers, of applicants for employment. Moreover, the MAC can in no sense be regarded as neutralizing any such contended absence of secrecy, when it is considered that representatives of hundreds of firms were to attend and participate in the MAC and that the Union anticipated that there would be considerable attendant publicity. Boeing was furnished with a copy of the "invitation." Knowledge and identity of the employees participating in the MAC would have been easily available to all concerned and was a foregone conclusion. In the Union description of the MAC it was stated (R. 479, G.C. Ex. 2):

> "This conference should be sufficiently unusual to be newsworthy and could thus aspire to considerable free publicity. This publicity in turn would have a further punitive action to discourage new hires from coming to Boeing."

Again (R. 479-80):

> " 'What if the Company finds out about the Conference?' It would be our intention that they find out well in advance, when some invited Companies send them our letter, if they haven't learned of it sooner by word of mouth."

(e) The "market" for the talents and abilities of engineers is not confined to the eighty firms in AIA. The Pearson letter (R. 486, G.C. Ex. 4) was sent to

some 2,800 firms throughout the United States which were regarded by the Union as "prospective employers of engineers" (R. 198).

(f) Boeing is the only aircraft manufacturer in the Pacific Northwest and, unlike the situation in the Los Angeles area, a move by one of Boeing's employees to another aircraft manufacturer involves, in most instances, a change of residence. All the Company's practice amounts to is to attempt where possible to remove a cause of dissatisfaction before an employee determines to take the major step of changing residence. Such a practice cannot help but be ultimately beneficial to the majority of employees.

(g) The policy reflected in the AIA resolution is not *inconsistent* with the spirit and objectives of the Act. Stability of labor relations, rather than a situation of constant migration and instability, is the result sought by the Act.

(h) Finally, the MAC "plan of action," as evolved and promoted by Union officials in the Company's employ can not realistically be regarded as having been aimed at the so-called Gentlemen's Agreement or at achieving some comprehensive and sweeping change in nation-wide or industry-wide employment practices. It was evolved and developed as a weapon aimed at the immediate employer and its obvious objective was to require the Company to finance a program designed to strip it of its engineering force to a point where capitulation to Union demands, or drastic and lasting damage, were the Company's only alternatives.

III.

The Analogies that the Board Attempts to Draw, as Between the Activities Here Involved and Certain Other Types of Activity, are Erroneous.

The Board would put the MAC on the same basis as a strike and "pre-strike activity" (Board br. 15). We know of no decision even suggesting the idea that "pre-strike activity" that is disloyal or causes damage while the employees continue on the payroll, is protected activity. Moreover, a strike and proper activities incidental thereto have specific statutory sanction. The strike, and the lockout, have been described by this Court in a previous case as the "correlative powers to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached" (*Leonard v. NLRB,* 197 F.2d 435 at 441 (CA-9, 1952)). But the fallacy of the analogy attempted in the Board's brief is apparent when consideration is made of the fact that the strike does not amount to a rejection of the bargaining principle; it is not a "disloyal" activity; it does not constitute an abandonment of employment nor does it encourage or facilitate such abandonment; it does not send personnel to the aid of a competitor; it can be terminated at any time by the union with full restoration of the work force and resumption of production; it is not required to be financed by the employer; and it is not designed to bring about substantial numbers of permanent severances. (See opening brief, page 43). In the case of the MAC type of activity, replacement can only occur after the successful conclusion of the activity and the occurrence of irre-

versible damage to the employer. Replacement can occur at any time during the progress of a strike.

Again, it is urged that the MAC type of activity be regarded as parallel to "hiring hall practices," the latter being alluded to as "legitimate union activity." The facts do not permit any such parallel. The typical hiring hall is staffed by union-paid members or individuals, and not by individuals employed by any employer with which the hiring hall deals. The primary objective of a hiring hall is to dispatch *unemployed* union members to employers who have available job openings. Wholly unlike the activities involved in this case, damage to, or pressure on an employer is not one of its objectives. It does not function in a manner to encourage, induce or facilitate working employees to change employment. It is submitted that an employer would be fully within his rights under Section 10(c) of the Act to discharge an employee for "cause" if that individual were found to be employed at a hiring hall and engaged in a program designed to hire personnel away from the employer in order to damage or bring "pressure" on him. Pertinent remarks of the Trial Examiner in regard to the matter of hiring halls appear at pages 88-9 of the Record.

IV.

The Decisions Do Not Support the Conclusions Urged in the Board's Brief.

The *Fansteel* case, one of the early decisions under the Wagner Act, is characterized in the Board's brief as "the leading decision." A sit-down strike accompanied by violence was in that case held to be un-

protected, but the decision has never been authority for the proposition that an activity to be unprotected must be violent or constitute an "actionable wrong." Under the present decisions determination of tort or contract liability clearly is not a required condition to the classification of an activity as unprotected. The very terms used by the courts in referring to activities deemed unprotected ("disloyal," "improper," "indefensible," etc.) demonstrate this.

The *Conn* and *Ward* cases are disposed of by the Board as inapplicable, because the means of attempting to cripple the employer's production involved in those cases were, respectively, refusals to work overtime, and refusals to work on certain materials. Neither these nor any other decisions have ever suggested that unprotected activities are confined to occurrences bearing on or related to work assignments, and the *Hoover* and *Jefferson Standard* cases both dealt with "outside" activities.

The proposition for which the *Wisconsin* case is cited by the Company is conceded by the Board (illegal action is not made legal by concert). And the *Jefferson Standard* decision approves application of this principle to disloyal or improper conduct, and discharges for cause (see opening brief, pages 46-7). The importance of this principle becomes apparent in view of a decision such as that in *NLRB v. Metal Mouldings Corp.* in which an individual who was not acting in concert with others, but who was found to have been recruiting employees for other employers, was deemed to have been properly discharged for cause. The

Board's brief contains no mention of the latter decision, which was cited in the opening brief.

The *Hoover* and the *Jefferson Standard* decisions are sought to be distinguished because the means used by the employees in those cases were "designed to destroy their employer's market" (Board br. 13). In other words, it is all right for an employer summarily to discharge employees who are attempting to cut down his sales, but an employer is compelled by the Act to continue to pay, and to do nothing to interfere with employees who are attempting to hamstring his production and aid his competitors by developing and attempting to activate a full scale program aimed at the encouragement and facilitation of mass transfers of his employees to his competitors and to other firms. Neither the *Hoover* nor the *Jefferson Standard* decisions afford any basis for such a tenuous distinction.

The gist of the *Hoover* decision is found in the following sentence:

> "He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business." (191 F.2d 380, 389).

The phrase "employer's business" is broad enough to include all aspects of the purchasing, manufacturing, shipping and selling processes, and the decision indicates no intention on the part of the Court to confine the meaning of the phrase as the Board suggests.

Similarly there is not a word in the Supreme Court's decision in the *Jefferson Standard* case that would infer that injury to the employer's market establishes

the perimeter of the area in which discharges for disloyalty are proper. The decision indicates that the result might be otherwise if damage were to occur as the consequence of statements made to the public, the primary purpose of which is to enlist public support and sympathy in connection with a labor dispute with a particular employer (as in the case of the conventional picket sign). This indication derives from the following statement in the opinion (346 U.S. 476):

> "Their [the employees'] attack related itself to no labor practice of the Company. It made no reference to wages, hours or working conditions."

This statement obviously was made by the Supreme Court in order to dispose of the possibility that the doctrine of *Thornhill v. Alabama* or *A. F. of L. v. Swing* (right of free speech in publicizing and enlisting public support in a labor dispute) was involved. Such doctrine is in no way involved in the instant case. The MAC was not publicized in any way to third persons as a vehicle or device for recruiting public support on the side of SPEEA in connection with any labor dispute between it and Boeing. (Neither Boeing nor any labor dispute is mentioned in the Pearson letter.)

In various other respects the situation here involved either parallels the *Jefferson Standard* situation, or involves even more flagrant employee activity. In *Jefferson Standard* there was not even the suggestion of abandoning the employer. Mass abandonment was one of the important key-notes of the MAC. The activities in both cases were designed to bring "pressure" upon the employer in connection with union bargaining

demands. The employers in both cases could have avoided being damaged by the activities (as the Board's brief suggests that Boeing could have avoided damage) by acceding to union demands. Neither the handbills in the *Jefferson Standard* case nor the Pearson letter in the present case made reference to the wages, hours or working conditions of the employer. Both activities were designed to permit the employees to continue to remain employed and draw pay as long as they chose, while the damage went on and the "pressure" increased. The potential damage from a successful activity of the type here involved is far greater and probably more lastingly incapacitating than the damage that ensued as the result of the disparaging remarks contained in the handbills mentioned. Certainly the intended result of the handbills in *Jefferson Standard* cannot be regarded as less onerous than the intended result, among others, of the MAC to "neutralize" the Company's recruitment campaign and to discourage new hires from coming to Boeing (R. 32-3, 477-8). Such an intended result could in no sense be regarded as one of the "legitimate objectives of employee concerted activity" (see Board's brief, page 16).

V.

Other Contentions of the Board Are Without Merit

The observation is made on page 14 of the Board's brief that "if any harm was visited on the employer here, it was not because the employees attacked his product or interfered with his selling; it was solely because he was not meeting the competition of other employers in the labor market." If this statement

were sound, few if any activities would be outside the protection of Section 7. Had the union demands been met in the *Jefferson Standard* case, issuance of the handbills would not have occurred; the boycott similarly could have been avoided in the *Hoover* case, and so on. The same observation applies to the activities regarded by the Courts as unprotected in other decisions. Further, there is no basis in fact for the assertion that Boeing was not competitive. Boeing offered a 6% increase months in advance of the time that its competitors placed such an increase in effect (R. 446). Compare the Union's demand for a 13.5% increase (Res. Ex. 5).

* * *

The principle expressed by the Company in the opening brief—that activities are unprotected where their primary intended result is to inflict economic damage upon an employer and at the same time maintain pay continuity and job security for the employees involved—is characterized as a fallacious "touchstone" in the Board's brief at page 15, the contention being that the matter of continuing to draw wages has no bearing on the protected or unprotected nature of the activities. This observation ignores the decisions on the subject. It is recognized that the improper, disloyal and indefensible nature of an activity may turn on the fact that it is directed against an employer from whom those engaged in the activity are continuing to draw pay. This is well recognized in the *Jefferson Standard, Hoover* and other decisions. An individual

continuing to draw pay owes complete loyalty to his employer and their common enterprise.

* * *

It is contended in the Board's brief at page 20 that the concededly "punitive action" of the MAC type of activity "is an inherent part of a system of private enterprise." Under the present status of the law, this cannot be true. Elsewhere the Board's brief refers to the invasion of "personal rights" as constituting unprotected activity. Under the Act, and the stability of labor relations that it attempts to achieve, it would certainly seem that, at the very least, one of such "personal" rights on the part of an employer, particularly one who is paying competitive wages, would be to free himself of an employee who is attempting to disturb and destroy such stability of relationship by conducting a campaign designed to bring about and encourage substantial numbers of personnel terminations.

* * *

Footnote 7 on page 10 of the Board's brief summarily disposes of the Company's contentions: that Pearson's discharge was for "cause" under Section 10(c) of the Act, and that his activities were part of a refusal to bargain as required by the Act—by stating in effect that if the activities were protected by Section 7, both contentions fall automatically. This is merely circuitous reasoning and in no way disposes of the contentions mentioned. One can just as well "dispose" of Section 7 by saying that if the discharge was for cause under Section 10(c), or if the activity in which Pearson was engaged did not meet the Act's require-

ments as to bargaining in good faith, then the activity could not have been a protected activity under Section 7, etc. Section 10(c), dealing with discharges for cause, and Section 8(b), dealing with the duty of unions to bargain in good faith, are as much a part of the Act as Section 7. The Supreme Court in the *Jefferson Standard* case disposed of the issue therein under Section 10(c) and not under Section 7. The footnote appears to contain the only direct comment in the Board's brief as to whether Pearson was discharged for cause and whether the activities in which he was engaged met the Act's standards of bargaining.

* * *

Finally, the test to determine whether an activity is "protected" or "unprotected" that the Board's brief urges upon this Court (Board br. 16) is:

> Does "the activity result[s] in an invasion of the employer's rights in a manner unrelated to the legitimate objectives of employee concerted activity—e.g., violent conduct, destruction of property, refusal to perform assigned tasks, disparagement of employer's product"?

Apparently this test is contended to establish a recognizable, clear-cut line, on one side of which an employer is free to terminate employees for invading his "rights," and on the other side of which such terminations constitute the serious offense of violating a national law. We find the purported test to be meaningless. What is "a manner unrelated to the legitimate objectives of employee concerted activity"? Are not sitdown strikes, slowdowns, wildcat strikes and intermittent strikes all conducted in a manner that is *related*

to the "legitimate objectives" mentioned in the Board's brief? Does not a "manner" of action have an "illegitimate" objective where, as here, the primary objective is to injure the employer, aid his competitors, discourage his potential new hires, and at the same time preserve pay continuity and job security for those so engaged? What possible concerted activity can there be that is not related in some manner to "legitimate objectives" of concerted activity—wages, hours, or working conditions? The patent ambiguity and inaccuracy of this purported test compels its rejection.

We again urge the applicability of the principle that an employee can not be on a strike and at work simultaneously, and that an activity is unprotected, irrespective of the propriety of its ultimate objectives, where the primary intended result of the means used is to effect severe damage on the employer, while at the same time employing a technique that will permit employees so engaged to continue to draw pay and retain complete job security.

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